

Richard J. Durbin, Patty Murray, and Charles E. Schumer.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that the debate on the motion to proceed to S. 2038, a bill to prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit, and for other purposes, be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LANDRIEU) and the Senator from New Jersey (Mr. MENENDEZ) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Georgia (Mr. ISAKSON), the Senator from Illinois (Mr. KIRK), and the Senator from Mississippi (Mr. WICKER).

The yeas and nays resulted—yeas 93, nays 2, as follows:

[Rollcall Vote No. 3 Leg.]

YEAS—93

Akaka	Franken	Moran
Alexander	Gillibrand	Murkowski
Ayotte	Graham	Murray
Barrasso	Grassley	Nelson (NE)
Baucus	Hagan	Nelson (FL)
Begich	Harkin	Paul
Bennet	Hatch	Portman
Bingaman	Heller	Pryor
Blumenthal	Hoeven	Reed
Blunt	Hutchison	Reid
Boozman	Inhofe	Risch
Boxer	Inouye	Roberts
Brown (MA)	Johanns	Rockefeller
Brown (OH)	Johnson (SD)	Rubio
Cantwell	Johnson (WI)	Sanders
Cardin	Kerry	Schumer
Carper	Klobuchar	Sessions
Casey	Kohl	Shaheen
Chambliss	Kyl	Shelby
Coats	Lautenberg	Snowe
Cochran	Leahy	Stabenow
Collins	Lee	Tester
Conrad	Levin	Thune
Coons	Lieberman	Toomey
Corker	Lugar	Udall (CO)
Cornyn	Manchin	Udall (NM)
Crapo	McCain	Vitter
DeMint	McCaskill	Warner
Durbin	McConnell	Webb
Enzi	Merkley	Whitehouse
Feinstein	Mikulski	Wyden

NAYS—2

Burr Coburn

NOT VOTING—5

Isakson	Landrieu	Wicker
Kirk	Menendez	

The PRESIDING OFFICER. On this vote, the yeas are 93, the nays are 2. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The Senator from Connecticut.

MORNING BUSINESS

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak therein for up to 10 minutes each, and that Senator GRASSLEY be

recognized to speak for up to 20 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. LIEBERMAN. Mr. President, on behalf of the majority leader, he has asked me to announce there will be no more votes tonight.

If I may say, on my own behalf, we will go to the STOCK Act, S. 2038, tomorrow morning and hope anyone who has a relevant amendment will come to the floor and offer it.

I yield the floor.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Iowa.

ORDER OF PROCEDURE

Mr. GRASSLEY. Madam President, I have been asked by Senator BROWN of Ohio if he could be recognized immediately after me.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

RECESS APPOINTMENTS

Mr. GRASSLEY. Madam President, one week ago today, I addressed the Senate on President Obama's decision to bypass the Senate, and the Constitution as well, by making four "recess" appointments at a time when the President's recess appointment power did not apply.

I explained in detail why the legal memo released by the Obama administration attempting to justify President Obama's actions did not hold legal water.

Last Thursday, I laid out the case that this is not an isolated incident or a technical legal squabble. Rather, the President's recent actions are part of a pattern of disregard for the constitutional system of checks and balances.

Today, I will address why such criticisms are justified and why such criticisms are necessary.

First, is it legitimate for a U.S. Senator to criticize a legal opinion issued by the Office of Legal Counsel and the Senate-confirmed head of that office?

I have no doubt Senators may criticize such opinions and, when the facts warrant, ask whether that office and its head are exercising the independence that is required for the Constitution to be upheld. Recently, we read some in the media apparently disagreed with this. They say it is wrong for a Senator to ever criticize a Senate-confirmed official's independence and judgment. They say that all a Senator can do is criticize the official's substantive arguments.

I say nonsense. When the media makes these claims, it merely seeks to divert attention from the weakness of the opinion's actual conclusions and reasoning. In my statement last week,

I laid out my disagreement with the contents of the Office of Legal Counsel. Of course, Senators and administration officials can reach different conclusions on the law; each can have a reasonable point of view; but that is not the case here.

If the Office of Legal Counsel is to be "the Constitutional conscience of the administration" that some in the media characterize it to be, it must exercise a certain level of independence, as I mentioned in my statement.

When a President who takes an expansive view of his power asks the Justice Department officials, who owe their job to him, whether he has the constitutional or legal authority to take such action, there is always the chance that pressure will overtake their responsibilities to provide their best legal judgment.

That is why at Ms. Seitz' confirmation hearing and in a followup communication, we took very painstaking efforts to give her the opportunity to state on the record her commitment to providing independent legal advice, to make sure she would place loyalty to the law and loyalty to the Constitution above her loyalty to the President. That was our purpose. Ms. Seitz promised to act independently. She promised not to stand idly by if she thought the Constitution was being violated.

The only way to tell whether the office has given independent advice, the only way to tell whether pressure has been resisted, is to review the arguments and the reasoning the Office of Legal Counsel provides.

The media cannot address criticism of whether the head of that office is independent and has used good judgment without such a review. It is not enough that the media might agree with her conclusions. In this case, the analysis in the Office of Legal Counsel opinion was so poor as to raise legitimate questions concerning judgment and independence.

The Office of Legal Counsel is supposed to give the President objective legal advice before that person acts. It is not supposed to provide a weakly thought-out rationalization for a Presidential decision to act that has already been made.

Here, the arguments in the opinion are so weak that a fair-minded person can question the independence and judgment of the opinion's author. For instance, the opinion is internally inconsistent. It correctly recognizes that a President's ability to make recess appointments turns on the capacity of the Senate to conduct business. But in determining whether the pro forma sessions constitute a recess, the opinion does not consider at all the capacity of the Senate to conduct business and what it could do. Rather, it relies upon what individual Senators said, not what the institution said or can do, and it ignores not only what theoretically the capacity of the Senate had to act but even its actual actions.

Similarly, the established meaning of the word "recess" is the same each